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and MALIKA ARYANPURE

**UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA**

BALBOA CAPITAL CORPORATION,
a California Corporation;

Plaintiff/Counterclaim Defendant,

v.

MITT LARY FAMILY PRACTICE,
LLC, an Alabama limited liability
company;

MALIKA ARYANPURE, an
individual,

Defendants/Counterclaim Plaintiff.

MITT LARY FAMILY PRACTICE,
LLC, an Alabama limited liability
company;
MALIKA ARYANPURE, an
individual,

Third-Party Plaintiff,

v.

CYNOSURE, LLC, a Delaware
Corporation,

Third-Party Defendants.

Case No. 8:23-cv-00936-MEMF-DFM

**DEFENDANTS MITT LARY
FAMILY PRACTICE, LLC'S AND
MALIKA ARYANPURE'S SECOND
AMENDED COUNTERCLAIMS
AND THIRD-PARTY COMPLAINT**

JURY TRIAL DEMANDED

**SECOND AMENDED COUNTERCLAIM AND THIRD-PARTY
COMPLAINT**

For its First Amended Counterclaims against Counterclaim Defendant BALBOA CAPITAL CORPORATION (“BALBOA”) and Third-Party Complaint against Third-Party Defendant CYNOSURE, LLC (“CYNOSURE”), Counterclaim and Third-Party Plaintiffs MITT LARY FAMILY PRACTICE, LLC and MALIKA ARYANPURE (together, “Counterclaim and Third-Party Plaintiffs”) allege as follows:

I. NATURE OF DISPUTE

1. Counterclaim and Third-Party Plaintiffs entered into a financing agreement for the purchase of a laser equipment on or about August 2019. Counterclaim and Third-Party Plaintiffs complied with the terms of the agreement in question and made monthly payments to BALBOA for several years until performance was excused due to the devastating consequences of the global coronavirus pandemic outbreak that changed the world, frustrated the purpose of the contract and made performance impracticable for Counterclaim and Third-Party Plaintiffs. Notwithstanding the foregoing, Counterclaim and Third-Party Plaintiffs actively attempted to reach an amicable resolution with BALBOA. It is in these circumstances that BALBOA, in total disregard of this unprecedented crisis and Counterclaim and Third-Party Plaintiffs’ good faith efforts to find a solution, responded by filing a lawsuit and demanding even more money to Counterclaim and Third-Party Plaintiffs.

II. PARTIES

2. Counterclaim and Third-Party Plaintiffs MALIKA ARYANPURE (“Dr. Aryanpure”) is and at all times herein mentioned was, an individual residing in the state of Alabama. MALIKA ARYANPURE is a Doctor of Medicine specializing in cosmetic surgery and related treatments.

3. Counterclaim and Third-Party Plaintiffs MITT LARY FAMILY

1 PRACTICE, LLC, (“MITT LARY”) is, and at all times herein mentioned was, a
 2 limited liability company organized and existing under the laws of the State of
 3 Alabama with its principal place of business in Alabama. Mitt Lary is a medical
 4 practice owned by Dr. Aryanpure.

5 4. Counterclaim Defendant BALBOA CAPITAL CORPORATION
 6 (“BALBOA” or “Lender”) is, and all times herein mentioned was, a corporation
 7 organized and existing under the laws of the State of California with its principal place
 8 of business located at 575 Anton Boulevard, 12th Floor, in the City of Costa Mesa,
 9 County of Orange, State of California. BALBOA at all times herein mentioned was a
 10 licensed California Finance Lender, CFL License No. 6032159, currently inactive.

11 5. Third-Party Defendant CYNOSURE, LLC (“CYNOSURE”) is, and all
 12 times herein mentioned was, a corporation organized and existing under the laws of
 13 the State of Delaware with its principal place of business located at 5 Carlisle Road,
 14 City of Westfield, State of Massachusetts. CYNOSURE marketed and sold the
 15 medical device at issue in the lawsuit to MITT LARY in or around July 2019.

16 6. At all times herein mentioned, each and every Counterclaim and Third-
 17 Party Defendants were the agent, partner, principal and employee, co-conspirator, co-
 18 venturer, and/or aided and abetted of each and every of the remaining Counterclaim
 19 and Third-Party Defendants and were at all times mentioned acting within the course
 20 and scope of such agency and employment.

21 7. As alleged in greater detail below, each and every Counterclaim and
 22 Third-Party Defendants knowingly and willfully entered into a common design, plan,
 23 and agreement with, to perpetrate the wrongs against Counterclaim and Third-Party
 24 Plaintiffs, and should be held vicariously liable.

25 **III. GENERAL ALLEGATIONS**

26 8. In 2019, CYNOSURE had employed high pressure sales tactics in
 27 marketing, CYNOSURE’s products, which involved sales representatives making
 28 “cold calls” to medical practices like MITT LARRY and represent to the respective

1 doctor or medical practice that it had selected its “highly respected medical practice
2 and trusted skills” to benefit from an exclusive business offer from CYNOSURE.

3 9. During this time, a CYNOSURE sales agent “Cassandra” had repeatedly
4 contacted MITT LARY to promote the sale of CYNOSURE’s products. Cassandra
5 was able to establish a friendly rapport through continuous conversations with Dr.
6 Aryanpure and was urging her to obtain for MITT LARY a cosmetic medical device
7 manufactured by CYNOSURE, Tempsure®, advertised as using a radiofrequency
8 (RF) platform to provide aesthetic non-invasive skin tightening procedures (the
9 “Equipment”).

10 **A. Counterclaim and Third-Party Plaintiffs were Fraudulently**
11 **Induced to Sign a Financing Agreement**

12 10. With respect to the Equipment, Cassandra made the following
13 misrepresentations to Dr Aryanpure: (a) the use of the Equipment by MITT LARY in
14 its Medical Practice will inevitably generate significant profits; (b) that CYNOSURE
15 would provide continuous and extensive technical training to MITT LARY’s medical
16 staff and employees on how to operate the Equipment; (c) that CYNOSURE would
17 handle the marketing of the Equipment and provide all brochures and marketing
18 material the various treatments MITT LARY could offer with the Equipment; and (d)
19 that CYNOSURE would support the business development surrounding the
20 Equipment for MITT LARY to build a clientele base.

21 11. MITT LARY did not want to invest the upfront capital in the Equipment,
22 which was priced at over \$180,000. However, Cassandra continued to pressure MITT
23 LARY to purchase the Equipment. During her conversations with Dr. Aryanpure,
24 Cassandra represented that CYNOSURE offered financing options for the purchase
25 of the Equipment and endorsed BALBOA as their exclusive financing partner.
26 Cassandra further represented to Dr. Aryanpure that MITT LARY could *only*
27 purchase the Equipment through the financing provided by BALBOA.

28 12. As part of CYNOSURE’s efforts to finalize the sale of the Equipment

1 to MITT LARY, Cassandra went to meet with Dr. Aryanpure on or around July 23,
2 2019, to discuss the terms for an Equipment Financing Agreement (“EFA”) with
3 BALBOA. At this meeting, Cassandra failed to disclose that BALBOA was a
4 separate company and did not confirm whether she or CYNOSURE were authorized
5 to discuss the EFA on behalf of BALBOA. Cassandra further represented to Dr.
6 Aryanpure that MITT LARY could cancel the EFA at any time.

7 13. Cassandra made various misrepresentations with respect to the EFA, by
8 directly stating to Dr Aryanpure; (e) that the amount of new businesses generated by
9 MITT LARY’s promotion and use of the Tempsure®, RF Platform, would be more
10 than sufficient revenue to cover the monthly payments due under the EFA; (f) that
11 only BALBOA could finance MITT LARY’s purchase of the Equipment; and (g) that
12 BALBOA would provide “extremely favorable” loan terms and interest rates to MITT
13 LARY in the EFA, yet never disclosed the terms and interest rates; and (h) that MITT
14 LARY could cancel the EFA at any time.

15 14. Through the statements and representations made by Cassandra,
16 Counterclaim and Third-Party Plaintiffs understood that CYNOSURE and BALBOA
17 held joint interests and were part of the same business. As a result of CYNOSURE’s
18 representations, MITT LARY was induced to sign the Equipment Financing
19 Agreement (“EFA”) with BALBOA on or about July 23, 2019. The EFA was
20 countersigned by BALBOA on or about August 1, 2019,

21 15. Under the terms of the EFA, BALBOA was to finance the full price of
22 the Equipment as presented by CYNOSURE, in the amount of One Hundred and
23 Eighty-Four Thousand, Nine Hundred and Eighty-Two 50/100 Dollars (\$184,982.50),
24 which was to be remitted through a wire transfer payable to CYNOSURE’s account.
25 The payment terms of the EFA required MITT LARY to make sixty-six (66) monthly
26 payments to BALBOA in the amount of \$99.00 for payments 1-6 and the amount of
27 \$4,205.50 for payments 7-66. The EFA also contained terms for personal guaranty
28 by Dr. Aryanpure (the “Guaranty”)

1 16. BALBOA at all relevant times mentioned herein was a licensed
2 California Finance Lender, License No. 6032159, currently in Inactive Status. As a
3 finance lender, BALBOA was required to comply with the California Financing Law,
4 California Finance Code Sections 22000 *et. seq.* and the specific subsections
5 regulating the financing of a commercial loan.

6 17. After Dr. Aryanpure signed the EFA, neither Cassandra nor anyone else
7 from CYNOSURE reached out to MITT LARY to offer the support Cassandra
8 promised would come with the Equipment. Despite the Equipment not performing as
9 promised and MITT LARY immediately facing numerous unexpected problems with
10 using the Equipment, Counterclaim and Third-Party Plaintiffs continuously
11 performed their obligations and sent monthly payments to BALBOA, until it became
12 impossible.

13 **B. Covid-19 outbreak frustrated the purpose of the EFA and rendered**
14 **performance by Counterclaim and Third-Party Plaintiffs**
15 **temporarily impossible.**

16 18. In late 2019, the outbreak of the novel Coronavirus Disease 2019
17 (“COVID-19”) had started in China, and shortly after the World Health Organization
18 declared COVID-19 a Public Health Emergency of International Concern.

19 19. In February and March 2020, COVID-19 was by then declared
20 worldwide pandemic and in response to the large spread in the United States, both
21 Federal and State governments initiated severe restrictions to fight the spread of
22 COVID-19, such as the closure of all unessential practices and businesses and stay at
23 home orders requiring all individuals to stay home unless furthering essential tasks
24 such as grocery shopping.

25 20. On March 19, 2020, the State Health Officer of Alabama issued the
26 Statewide Order ‘Suspending Certain Public Gatherings Due to Risk of Infection by
27 Covid-19’ The Statewide Order was pursuant to the Code of Alabama 1975 § 22-2-
28 2(4), which authorizes the State Health Officer, on behalf of the State Board of Health,

1 to direct those conditions prejudicial to health in public places within the State be
2 abated.

3 21. By the end of March 2020, multiple Federal and state regulations have
4 been implemented requiring individuals to stay at home unless they are furthering
5 essential tasks; to respect social distances at all times, which involved keeping a
6 distance of six feet from one another at all times; and the closure of non-essential
7 businesses.

8 **C. Counterclaim and Third-Party Plaintiffs Could no Longer Comply**
9 **with terms of EFA.**

10 22. In light of this sudden and unimaginable outbreak, Counterclaim and
11 Third-Party Plaintiffs closed their medical practice on or about March 2020 in order
12 to protect the health and safety of the patients and employees and to comply with
13 corresponding government orders and guidelines. As a result, Counterclaim and
14 Third-Party Plaintiffs, as many other individuals and businesses, have been drastically
15 harmed by this global pandemic and suffer from its economic impact.

16 23. Because COVID-19 regulations imposed a mandatory distance of 6 feet
17 between all individuals, Counterclaim and Third-Party Plaintiffs' medical practice--
18 which included the use of the Equipment in close contact with the faces and bodies of
19 patients- had been prohibited by the COVID-19 health regulations. The unforeseeable
20 and mandatory suspension of Counterclaim and Third-Party Plaintiffs' medical
21 practice, for an undetermined amount of time, resulted in an absence of income as the
22 operation of MITT LARY constitutes Counterclaim and Third-Party Plaintiffs' main
23 source of revenue.

24 24. As a result, after complying with their obligations under the EFA for
25 approximately nine months, Counterclaim and Third-Party Plaintiffs came to the
26 realization that moving forward, and for an uncertain period of time, they could not
27 keep up with the monthly payments due to BALBOA under the EFA as originally
28 contemplated. The issue faced by Counterclaim and Third-Party Plaintiffs was not a

1 minor delay of available money, but rather the total absence of a foreseeable
 2 permanent reopening MITT LARY, in a manner that would generate a continuous and
 3 stable source of income and will permit Counterclaim and Third-Party Plaintiffs to
 4 comply with their monthly payment obligations under the EFA. Therefore, before the
 5 next monthly payment was due, Counterclaim and Third-Party Plaintiffs reached out
 6 to BALBOA to find a reasonable and amicable solution.

7 25. Based on the unprecedented and unexpected change of circumstances
 8 caused by COVID-19 pandemic and Counterclaim and Third-Party Plaintiffs good
 9 faith compliance with the terms of the EFA up until that time; Counterclaim and
 10 Third-Party Plaintiffs expected BALBOA to make good faith efforts to find a
 11 reasonable solution, but this was not the case. Rather, in total disregard of
 12 Counterclaim and Third-Party Plaintiffs' circumstances, BALBOA continued to
 13 make withdrawals of the monthly amounts from Counterclaim and Third-Party
 14 Plaintiffs' bank account. However, the requested amounts were not available in
 15 Counterclaim and Third-Party Plaintiffs' bank account.

16 26. Instead of attempting to find a solution with Counterclaim and Third-
 17 Party Plaintiffs, BALBOA, filed a complaint on May 27, 2020 in California Superior
 18 Court entitled, *Balboa Capital Corporation v. Mitt Lary Family Practice LLC, et al.*,
 19 Case No. 30-2020-01146549-CU-CL-CJC (Cal. Supr.) (hereinafter "*Balboa I*") and
 20 demanded even more money from Counterclaim and Third-Party Plaintiffs. *Balboa I*
 21 involved essentially the same allegations and causes of action as being alleged in the
 22 above captioned Complaint. The parties vigorously litigated *Balboa I* over three
 23 years, including extensive discovery, numerous discovery motions, and several
 24 continuations of the trial date. Trial was scheduled to begin on October 9, 2023.
 25 Without any prior notice or explanation, after three years of litigating *Balboa I*,
 26 BALBOA voluntarily dismissed *Balboa I* without prejudice on May 16, 2023.
 27 Having delayed adjudication of the underlying dispute between the parties, BALBOA
 28 now believes that it is its right to immediately receive the shocking amount of

1 \$242,508.01, plus interests.

2 27. Since that time BALBOA had refused to provide an extension of time or
3 forbearance on MITT LARY's payment obligations under the EFA. Despite offers by
4 the Counterclaim and Third-Party Plaintiff, BALBOA has refused to permit MITT
5 LARY to continue the previous monthly payments and has instead declared the entire
6 amount under the EFA, plus interest and attorney fees, due and payable. Counterclaim
7 and Third-Party Plaintiffs therefore respectfully request the Court to order the
8 equitable and legal relief requested herein, including a declaration as to the extent to
9 which Counterclaim and Third-Party Plaintiffs's monthly payments was and is abated
10 and a reformation or rescission of the EFA accordingly.

11 **FIRST CAUSE OF ACTION**

12 **BREACH OF ORAL CONTRACT**

13 **(Against CYNOSURE)**

14 28. Counterclaim and Third-Party Plaintiffs repeat and reallege each and
15 every allegation set forth above as if set forth fully herein.

16 29. As alleged with more particularity in the allegations set forth above,
17 CYNOSURE sold the Equipment to MITT LARY. Accordingly, CYNOSURE
18 entered into an oral contract with Counterclaim and Third-Party Plaintiffs, wherein in
19 exchange for MITT LARY's purchase of the Equipment and Dr. Aryanpure's
20 Guaranty by executing the EFA, CYNOSURE agreed to provide the following
21 valuable performance: guarantee Counterclaim and Third-Party Plaintiffs' successful
22 use and profit generation from the Equipment; to provide training, business support
23 and marketing materials for Counterclaim and Third-Party Plaintiffs; build up
24 clientele for Counterclaim and Third-Party Plaintiffs; and other affirmations of fact
25 as terms forming the basis of the oral contract.

26 30. The terms of the oral contract were clear enough that both the
27 Counterclaim and Third-Party Plaintiffs and CYNOSURE could understand what
28 each was required to do and each agreed to the terms.

1 31. As alleged with more particularity in the allegations set forth above,
2 Counterclaim and Third-Party Plaintiffs fully performed their obligations under the
3 oral contract by purchasing the Equipment through the execution of the EFA.

4 32. Through Counterclaim and Third-Party Plaintiffs' performance on the
5 oral contract, CYNOSURE received the full bargained for compensation for the
6 Counterclaim and Third-Party Plaintiffs execution of the EFA. Despite CYNOSURE
7 receiving the full benefit of the funds obtained from financing of the purchase of the
8 Equipment, CYNOSURE's sale of the Equipment, CYNOSURE failed to perform
9 any of the agreed promises under the terms of the oral contract.

10 33. As the foreseeable and actual result of the CYNOSURE's breach of
11 contract, Counterclaim and Third-Party Plaintiffs were damaged in the amount that
12 was paid to finance the Equipment, including all sales price, tax, principal, interest
13 and markups, as well as all amounts Counterclaim and Third-Party Plaintiffs' may be
14 found liable by executing the EFA. Counterclaim and Third-Party Plaintiffs were also
15 further harmed by all amounts spent in efforts to support the business and advertise
16 the Medical Practices use of the Equipment.

17 34. As alleged with more particularity in the allegations set forth above,
18 Counterclaim and Third-Party Plaintiffs were harmed by these breaches, including
19 Counterclaim and Third-Party Plaintiffs' inability to use the Equipment for its
20 business, and yet still paid substantial amounts under the EFA. Subsequently,
21 Counterclaim and Third-Party Plaintiffs have incurred even more damages in
22 attorneys' fees and legal costs involved in defending against the complaint filed by
23 BALBOA in *Balboa I* and in this lawsuit.

24 35. As a proximate result of this conduct, Counterclaim and Third-Party
25 Plaintiffs have been damaged in an amount according to proof, but in an amount no
26 less than \$300,000.00.

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SECOND CAUSE OF ACTION

BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR

DEALING

(Against CYNOSURE)

36. Counterclaim and Third-Party Plaintiffs repeat and realleges each and every allegation set forth above as if set forth fully herein.

37. Every contract includes an implied covenant of good faith and fair dealing, whereby each party agrees not to engage in any acts which would unfairly interfere with the other party's rights to the benefits to the contract. California courts have defined "good faith" in a contract to mean honesty of purpose without any intention to mislead or to take unfair advantage of another.

38. As alleged in the detail in the cause of action above, Counterclaim and Third-Party Plaintiffs and CYNOSURE entered into an oral contract for CYNOSURE's performance on their oral promises in exchange for Counterclaim and Third-Party Plaintiffs' purchase of the Equipment. Under the oral contract CYNOSURE owed Counterclaim and Third-Party Plaintiffs a duty of honesty of purpose without any intention to mislead or to take unfair advantage of another.

39. Cynosure breached its duty of good faith by failing to perform the promises under the oral contract, by misleading Counterclaim and Third-Party Plaintiffs to believe that CYNOSURE's required Lender, BALBOA, and CYNOSURE were part of the same business; and by misrepresenting the terms of the EFA with the Lender.

40. Counterclaim and Third-Party Plaintiffs have performed all duties under the oral contract with CYNOSURE and were excused for performance under the EFA with the Lender. While CYNOSURE breached the oral contract as alleged above, CYNOSURE's breach of a specific provision of the oral contract is not prerequisite. The covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.

41. In committing the breaches of contract detailed above in the General Allegations and First Cause of Action, CYNOSURE did not act fairly, honestly or in good faith and therefore breached the implied covenant of good faith and fair dealing.

42. As alleged with more particularity in the allegations set forth above, Counterclaim and Third-Party Plaintiffs were harmed by these breaches, including being denied the benefit of the bargain to assure its successful use of the Equipment for its business, and yet still paid nearly \$13,300 to BALBOA and more than \$25,000.00 to support its business. Subsequently, Counterclaim and Third-Party Plaintiffs have incurred an even larger amount of attorneys' fees and costs defending *Balboa I* and this instant court action commenced by BALBOA.

43. The violations detailed above were intentional, and a tort-based recovery for breach of the covenant of good faith and fair dealing is appropriate here because of the special relationship between the contracting parties.

44. As a proximate result of this conduct, Counterclaim and Third-Party Plaintiffs have been damaged in an amount according to proof.

45. CYNOSURE's conduct and each of them was fraudulent, malicious, and oppressive within the meaning of section 3294 of the California Civil Code, in that they intended to cause injury to Counterclaim and Third-Party Plaintiffs and acted despicably, with a willful and conscious disregard of the rights of Counterclaim and Third-Party Plaintiffs. Counterclaim and Third-Party Plaintiffs are therefore entitled to an award of exemplary and punitive damages, in an amount deemed appropriate by the trier of fact, to punish and make an example of Cynosure.

THIRD CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAWS

Cal. Bus. & Prof Code §1700, et seq.

(Against CYNOSURE)

46. Counterclaim and Third-Party Plaintiffs repeat and re-allege the allegations contained in every preceding paragraph as if fully set forth herein.

1 47. Cal. Bus. & Prof. Code § 17500 provides: It is unlawful for any
2 person...corporation...with intent...to dispose of...personal property...to induce the
3 public to enter into any obligation relating thereto, to make or disseminate or cause to
4 be made or disseminated...from this state before the public in any state, in any
5 newspaper or other publication, or any advertising device, or by public outcry or
6 proclamation, or in any other manner or means whatever, including over the Internet,
7 any statement...which is untrue or misleading, and which is known, or which by the
8 exercise of reasonable care should be known, to be untrue or misleading...”. “or for
9 any person, firm, or corporation to so make or disseminate or cause to be so made or
10 disseminated any such statement as part of a plan or scheme with the intent not to sell
11 that personal property or those services, professional or otherwise, so advertised at
12 the price stated therein, or as so advertised.”

13 48. The “intent” required by Section 17500 is the intent to dispose of
14 property, and not the intent to mislead the public in the disposition of such property.

15 49. CYNOSURE claimed to offer a benefit to Counterclaim and Third-Party
16 Plaintiffs through its partnership with BALBOA; claimed it would support
17 Counterclaim and Third-Party Plaintiffs’ marketing and business development in
18 offering treatments through the Equipment, guaranteed the generation of business
19 from new clients, sufficient for Counterclaim and Third-Party Plaintiffs to cover
20 monthly payments due under the EFA, and claimed Counterclaim and Third-Party
21 Plaintiffs could cancel the EFA at any time.

22 50. These claims by CYNOSURE were unfair, untrue, and misleading
23 practices, which did, in fact, misled Counterclaim and Third-Party Plaintiffs. By these
24 untrue and misleading statements CYNOSURE induced Counterclaim and Third-
25 Party Plaintiffs to purchase the Equipment and to sign the EFA and failed to disclose
26 the actual terms of the EFA.

27 51. As a direct and proximate result of CYNOSURE’s misleading and false
28 advertisements, Counterclaim and Third-Party Plaintiffs have suffered injury in fact

1 and have lost money. As such, Counterclaim and Third-Party Plaintiffs request that
 2 this Court order CYNOSURE to restore this money paid for the Equipment to
 3 Counterclaim and Third-Party Plaintiffs, and to enjoin CYNOSURE from continuing
 4 these unfair practices in violation of the California Unfair Competition Law in the
 5 future. Otherwise, Counterclaim and Third-Party Plaintiffs and the broader general
 6 public, will be irreparably harmed and/or denied an effective and complete remedy.

7 **FOURTH CAUSE OF ACTION**

8 **NEGLIGENCE and NEGLIGENCE PER SE** 9 **(AGAINST BALBOA)**

10 52. Counterclaim and Third-Party Plaintiffs repeat and re-allege the
 11 allegations contained in every preceding paragraph as if fully set forth herein.

12 53. At all relevant times mentioned herein, BALBOA was a licensed
 13 California Finance Lender, subject to regulations California Financing Law, CA FIN
 14 Code §§ 22000 *et. seq.* (“CFL”).

15 54. BALBOA as the Lender, financed the purchase of the Equipment
 16 through the consummation of a commercial loan which was solicited and procured by
 17 a person who did not hold a CFL license issued through the State of California,
 18 through a borrower referred to BALBOA by that unlicensed person.

19 55. Under CFL § 22603, before Counterclaim and Third-Party Plaintiffs
 20 signed the EFA, BALBOA had a duty to provide Counterclaim and Third-Party
 21 Plaintiffs as a prospective borrower, the following written statement, in 10-point font
 22 or larger, and require Counterclaim and Third-Party Plaintiffs to acknowledge receipt
 23 of the statement in writing:

24
 25 You have been referred to us by [Name of Unlicensed
 26 Person]. If you are approved for the loan, we may pay a fee
 27 to [Name of Unlicensed Person] for the successful referral.
 28 [Licensee], and not [Name of Unlicensed Person] is the sole
 party authorized to offer a loan to you. You should ensure
 that you understand any loan offer we may extend to you
 before agreeing to the loan terms. If you wish to report a
 complaint about this loan transaction, you may contact the

Department of Business Oversight at 1-866-ASK-CORP (1-866-275-2677), or file your complaint online at www.dbo.ca.gov.

56. Additionally, CFL § 22602(b) provides that, “A licensee that pays compensation to a person that is not licensed in connection with a referral for a commercial loan made by that licensee to a borrower shall be liable for any misrepresentation made to that borrower in connection with that loan.” Counterclaim and Third-Party Plaintiffs were borrowers of commercial loan made by BALBOA and is in the class of persons which CFL § 22602(b) is intended to protect.

57. BALBOA breached its statutory duty to provide this written statement to the Counterclaim and Third-Party Plaintiffs. As a direct result of BALBOA’s breach, Counterclaim and Third-Party Plaintiffs were under the belief that BALBOA and CYNOSURE were party of the same business, and that the representations CYNOSURE made regarding the loan and terms for financing under the EFA were true.

58. As a result of BALBOA failing to fulfill its statutory duty, Counterclaim and Third-Party Plaintiffs reasonably believed that representations made by the sales representative from CYNOSURE were true and was not on notice that BALBOA held different interests in financing the purchase of the Equipment. Accordingly, Counterclaim and Third-Party Plaintiffs obligated themselves under the EFA under the mistaken belief that the relevant representations made by CYNOSURE salesperson were true and that the execution of the EFA obligated CYNOSURE to perform on the promises it made.

59. Due to BALBOA’s violation of the commercial loan provisions of the CFL which were intended to protect Borrowers like Counterclaim and Third-Party Plaintiffs, BALBOA’s negligence is presumed.

60. But for BALBOA’s failure to comply with its requirements of the CFL which is applicable to all license finance lenders, Counterclaim and Third-Party Plaintiffs would not have been induced to sign the EFA by CYNOSURE’s

1 misrepresentations as alleged above. BALBOA is further liable for all
 2 misrepresentations made by the unlicensed person per the provisions of the CFL.

3
 4 **FIFTH CAUSE OF ACTION**
 5 **RESCISSION OR CANCELLATION**
 6 **(Against All Cross-Defendants)**

7 61. Counterclaim and Third-Party Plaintiffs repeat and re-allege the
 8 allegations contained in every preceding paragraph as if fully set forth herein.

9 62. California Civil Code § 1689 expressly recognizes a party's right to
 10 rescind a contract if the consent of the party was given by mistake or obtained through
 11 fraud exercised by or with the connivance of the party seeking to enforce the contract.

12 63. California Civil Code § 1577 characterizes a mistake of fact as a mistake
 13 consisting of a belief in the present existence of a thing material to the contract, which
 14 does not exist.

15 64. California Civil Code §§ 2300 and 2317 establish the authority of an
 16 ostensible agent when the principal "intentionally or by want of ordinary care" allows
 17 a third person to believe the agent has such authority.

18 65. Counterclaim and Third-Party Plaintiffs' consent to the EFA was given
 19 by the mistake that CYNOSURE would provide services and support for
 20 Counterclaim and Third-Party Plaintiffs' successful and profitable use of the
 21 Equipment.

22 66. Counterclaim and Third-Party Plaintiffs' consent to the EFA was also
 23 obtained by the fraudulent misrepresentations made by CYNOSURE's sales
 24 representative, Cassandra, including the false promise of services and support
 25 CYNOSURE would provide to Counterclaim and Third-Party Plaintiffs, and the false
 26 representations of the financing terms under the EFA for the loan provided by
 27 BALBOA, including that Counterclaim and Third-Party Plaintiffs could cancel the
 28 EFA at any time.

1 67. Neither CYNOSURE, or CYNOSURE's sales representative,
2 Cassandra, were licensed under the CFL, yet received compensation for its referral of
3 the Counterclaim and Third-Party Plaintiffs to BALBOA for a commercial loan.
4 Counterclaim and Third-Party Plaintiffs are informed and believe, and on that basis
5 allege that BALBOA paid compensation to CYNOSURE in connection with the
6 referral of Counterclaim and Third-Party Plaintiffs for a commercial loan. The CFL
7 holds a licensed finance lender is liable for any misrepresentations made by an
8 unlicensed person referring a borrower to that lender.

9 68. Additionally, as alleged in the detail in the Fourth Cause of Action,
10 BALBOA was negligent in its failure to provide written disclosure of its sole authority
11 to offer Counterclaim and Third-Party Plaintiffs a loan. Therefore, *if not intentionally*
12 *then at least by want of ordinary care*, BALBOA allowed for CYNOSURE
13 representative to make unchallenged false representations of the EFA and the
14 financing of the Equipment to Counterclaim and Third-Party Plaintiffs.

15 69. Accordingly, by at least want or ordinary care, BALBOA allowed
16 Counterclaim and Third-Party Plaintiffs to believe that CYNOSURE had authority,
17 either as an agent or as a party with joint business interests as BALBOA, to represent
18 the terms of the EFA to Counterclaim and Third-Party Plaintiffs.

19 70. BALBOA is responsible for CYNOSURE's fraudulent acts through
20 ostensible agency and has statutory liability under the CFL for the misrepresentations
21 made by CYNOSURE's representative, Cassandra. Moreover, Counterclaim and
22 Third-Party Plaintiffs' consent to the EFA was obtained through fraud for which
23 BALBOA is liable, and therefore the EFA is subject to rescission by Counterclaim
24 and Third-Party Plaintiffs.

25 71. Counterclaim and Third-Party Plaintiffs seeks an order from this court
26 rescinding the EFA and holding that Counterclaim and Third-Party Plaintiffs and
27 returning the parties to their status quo ante.

28 ///

PRAYER FOR RELIEF

WHEREFORE, Counterclaim and Third-Party Plaintiffs pray for judgment as follows:

1. Awarding judgement for Counterclaim and Third-Party Plaintiffs and damages in an amount to be proven at trial;
2. Awarding rescission declaratory relief as alleged above;
3. Awarding the injunctive relief necessary to ensure that Counterclaim and Third Party Defendants' conduct alleged herein does not continue into the future;
4. An award for attorneys' fees under California Civil Code Section 1717 and/or California Code of Civil Procedure § 1033.5.
5. For legal costs, filing costs and costs of suit;
6. For interest, pre-judgment and post-judgment, on damages recoverable, and appropriate consequential and incidental damages as allowed by law; and,
7. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Defendants and Counterclaim and Third Party Defendants demand a trial by jury on all triable claims.

ADLI LAW GROUP, P.C.

Dated: February 21, 2024

By: /s/ Dariush G. Adli
 Dariush G. Adli
 Jacob Mojarro
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 MITT LARY FAMILY PRACTICE, LLC
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